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PETITIONER'S REPLY BRIEF

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1303

CARL D. BISHOP,

Petitioner,

v.

W. H. WOOD, CHIEF OF POLICE OF THE CITY OF MARION, NORTH CAROLINA; VICTOR DENTON, CITY MANAGER OF THE CITY OF MARION, NORTH CAROLINA; and THE CITY OF MARION, NORTH CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

****

Norman B. Smith
Smith, Patterson, Follin,
Curtis & James
704 Southeastern Building
Greensboro, N. C. 27401

Counsel for Petitioner

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PETITIONER'S REPLY BRIEF

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 1303

CARL D. BISHOP,

Petitioner,

v.

W. H. WOOD, CHIEF OF POLICE OF THE CITY OF MARION, NORTH CAROLINA; VICTOR DENTON, CITY MANAGER OF THE CITY OF MARION, NORTH CAROLINA; and THE CITY OF MARION, NORTH CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOR THE FOURTH CIRCUIT

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ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION OF THIS CASE UNDER 28 U.S.C. 1343 and 42 U.S.C. 1983.

Respondents incorrectly argue that the district court was without jurisdiction under 28 U.S.C. 1343 and 42 U.S.C. 1983. Apparently those sections provide no jurisdictional basis for a claim against defendant City of Marion. City of Kenosha v. Bruno, 412 U.S. 507 (1973). But clearly these statutes constitute a proper jurisdictional basis for claims against defendants W. H. Wood, Chief of Police, and Victor Denton, City Manager.

Respondents argue that because the words "and individually" were not inserted in the complaint following the official designations of defendants Wood and Denton (A. 3-4), there was no subject matter jurisdiction. (Respondents' Brief, pp. 4-5). This argument is unsound for three reasons.

First, the executive officers of state and local governmental units have no absolute immunity from damage claims, even when sued in their official capacities. At most they have a qualified immunity. Scheur v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, ___ U.S. ___, 43 L.ed.2d 214 (1975).

Second, petitioner has sought injunctive relief against respondents, consisting of reinstatement. (A. 9). A suit for injunctive relief against an officer is properly lodged against him in his official capacity. When an officer acts in an unconstitutional manner, his actions are stripped of their official cloak, and he may be ordered to perform duties in consonance with the Constitution. Ex parte Young, 209 U.S. 123, 159 (1908);

Griffin v. County School Board, 377 U.S. 218, 228 (1964). In fact it is only in their official capacities that respondents have the power to reinstate petitioner as a policeman. O'Brien v. Galloway, 362 F.Supp. 901 (D.Del. 1973) (policeman discharge case).

Third, the failure to include the words "and individually" in the caption and introductory paragraphs of the complaint, cannot be deemed under the Federal Rules of Civil Procedure to constitute a fatal jurisdictional defect. Technical forms of pleadings are not required, and all pleadings shall be construed to do substantial justice. Rule 8(e)(1), (f). Under Rule 10(a) where the real defendant is identifiable from the

record, or it appears that the real defendant has actually been personally served, a misnomer as to name or capacity is of no consequence. Nicol v. Baird, 234 F.2d 691 (D.C.Cir. 1956); Miller v. Director of Middletown State Hospital, 146 F.Supp. 674 (S.D.N.Y. 1956), aff'd., 243 F.2d 527 (2d Cir. 1956).

Contrary to respondents' contention (Respondents' Brief, p. 4), it is alleged that the Chief of Police and the City Manager violated the applicable city ordinance. However, even if the conduct of these officers was perfectly in accord with local law, they would remain liable for violation of petitioner's constitutional rights under 42 U.S.C. 1983. It has

always been understood that state action giving rise to liability under this statute includes action taken by state officials pursuant to state law, as well as in violation of it. Monroe v. Pape, 365 U.S. 167, 184 (1961).

As an alternative jurisdictional basis, petitioner has invoked 28 U.S.C. 1331. Petitioner is in agreement with respondents' statement that jurisdiction under 28 U.S.C. 1331 cannot be determined on the present record, and it would be necessary for the district court on remand to determine whether jurisdiction can be founded on this section. (Respondents' Brief, pp. 6-7).

II. PETITIONER CONSISTENTLY AND CORRECTLY HAS MAINTAINED THAT HE WAS DISCHARGED IN VIOLATION OF THE MUNICIPAL PERSONNEL ORDINANCE.

Respondents state, "Petitioner does

not contend that his discharge was other than in accord with the provisions of the City's personnel ordinance. (Respondents' Brief, p. 7). In his opening brief (pp. 38-39) petitioner made it clear that he did not regard his discharge to have been in conformity with the Marion Personnel Ordinance. Petitioner's position is that he was not notified of any deficiencies in his work nor told what he must do to render it satisfactory, that he did not continue to be and never was a substandard performer, negligent, inefficient or unfit, and that he was never given a written notice setting forth reasons for the discharge, all in contravention to the personnel ordinance.

Respondents argue that the ordinance permits, but does not require, the continued employment of one whose work is

satisfactory. Yet respondents concede that "the ordinance is mandatory with respect to notifying employees of areas of deficient performance, . . ." (Respondents' Brief, pp. 9-10). Since for purposes of summary judgment petitioner has shown that he was not notified that his work was deficient in any way prior to discharge, an admittedly essential procedure was violated, and petitioner is entitled to relief for that reason alone. Arnett v. Kennedy, 416 U.S. 134 (1974).

To pursue respondents' construction of the ordinance to a logical conclusion, an absurd result is obtained: A "permanent" employee whose service is diligent, productive and in all respects satisfactory may be discharged at any time without warning or cause; while the "negligent inefficient or unfit" worker must be given

notice of his shortcomings and an opportunity to conform to standards, and then can be discharged only for continued deficiency. The only intelligible reading of this ordinance is to accord all permanent employees job security, and to allow for dismissal only of those with deficient performance, and then only after warning, after opportunity for reform, and with good cause.

For reasons set forth in petitioner's opening brief (pp. 20-23), the personnel ordinance gave rise to a constitutionally protected property interest of objective expectancy of continued employment, because of its terminology "permanent employee", the enumeration of causes for

dismissal, and the requirement of warning and opportunity for reform.

Respectfully submitted,

Attorney for Petitioner*
Norman B. Smith
Smith, Patterson, Follin, Curtis & James
704 Southeastern Building
Greensboro, N. C. 27401
Telephone: 919-274-2992

* The prosecution of this proceeding is sponsored by the North Carolina Civil Liberties Union Legal Foundation, Inc.